No. 02-750 NOV 12 2002

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IN THE

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,
Petitioner,

v.

CITY OF TIGARD, AND
WASHINGTON COUNTY,
Respondents.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a local government exact development fees it has adopted through a legislative process without complying with the "rough proportionality" standards of *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

CORPORATE DISCLOSURE STATEMENT

Petitioner Rogers Machinery Company, Inc. is a privately held corporation. It has no parent corporation or subsidiary.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rogers Machinery Company, Inc. (Rogers) respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals.

OPINIONS BELOW

The Opinion of the Oregon Court of Appeals is reproduced as Appendix A to this petition. The Order Denying Review of the Oregon Supreme Court is reproduced as Appendix B to this petition. The Judgment of the Washington County Circuit Court is reproduced as Appendix C to this petition. The letter opinion of the Washington County Circuit Court, Judge Thomas Kohl, is reproduced as Appendix D to this petition. The Findings, Conclusions, and Order of the Washington

County Hearings Officer is reproduced as Appendix E to this petition. Finally, the Washington County Traffic Impact Fee ordinance is reproduced as Appendix F to this petition.

JURISDICTION

The Order Denying Review of the Oregon Supreme Court was filed on August 13, 2002. The opinion of the Oregon Court of Appeals was filed on May 8, 2002. This petition is timely under Supreme Court Rule 13.1. The Court has jurisdiction of this matter pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND MUNICIPAL CODE PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 3.17 of the Washington County Code contains the County's Traffic Impact Fee (TIF) ordinance. The ordinance is set forth in full in Appendix F.

STATEMENT OF THE CASE

Rogers Machinery Company, Inc. (Rogers) operates its Corporate Headquarters and its Portland branch from its building in Tigard, Oregon. Rogers manufactures, sells, distributes and services compressors, pumps, and blowers.

Until 1997, Rogers' Corporate Headquarters and its Portland branch were located in a single building. Over the years, Rogers' building had become outdated and overcrowded. As a result, in February, 1997 Rogers applied

to the City of Tigard for a building permit to construct a new building at the same location as the existing building. Appendix A at 2. The purpose of the new building was to relieve the overcrowding in the existing building. Rogers planned to move approximately 40 employees from the old building to the new building. No additional employees were being hired, however, and it was undisputed that Rogers' plans would not result in additional traffic.

Despite the fact that Rogers' new building would generate no additional traffic, the City refused to issue Rogers' building permit until Rogers agreed to pay a $37,102 traffic impact fee (TIF). The TIF is a legislatively adopted ordinance designed to "ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development." Appendix F at 47. The TIF is calculated according to a set formula that measures the number of new automobile trips that a new building may generate, based upon its size and use, multiplied by a set dollar figure per trip. *Id.* at 52. From those calculations, a hypothetical traffic impact is calculated. *Id.* at 52. Actual traffic impacts for a particular development are not factored into the TIF calculation.

Rogers objected to the condition that it pay the TIF in exchange for its building permit, and appealed the City's demand to the Washington County Hearings Officer. Appendix A at 2. Rogers' raised constitutional and statutory challenges to the imposition of the TIF. Specifically, Rogers argued that imposition of the TIF, as applied to Rogers, violated the Takings Clause of the Fifth Amendment to the United States Constitution, because the amount of the TIF was not "roughly proportional" to the traffic impacts caused by Rogers' new building, and was not based on an individualized determination of the actual traffic impacts resulting from Rogers' development, as required by *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The Hearings Officer agreed with Rogers that no new traffic would be generated by Rogers' new building, and made a specific finding to that effect. Appendix E at 46. That finding is unchallenged. Nevertheless, the Hearings Officer held that the TIF is a tax, and that *Dolan v. City of Tigard*, 512 U.S. 374 (1994) does not apply to taxes. *Id.* at 45-46.

Rogers paid the TIF, which was recalculated by the city and totaled $37,018, and commenced an action in the Washington County Circuit Court. Appendix A at 3. Again, Rogers argued that application of the TIF to Rogers did not comport with *Dolan*. *Id.* at 3. The trial court disagreed, holding in a one page letter opinion that the TIF is a tax to which *Dolan* did not apply, not a fee. Appendix D.

Rogers appealed the trial court's decision to the Oregon Court of Appeals. Although the parties briefed and argued the trial court's tax versus fee distinction, the Oregon Court of Appeals ignored the trial court's ruling. Appendix A at 12-14. The court held that the TIF had elements of both a tax and fee under Oregon law, and that the tax versus fee argument would not be responsive to Rogers' takings argument. *Id.* at 12-14.[1]

Rogers reiterated its constitutional and statutory challenges, arguing that imposition of the TIF to Rogers resulted in a Fifth Amendment taking, as interpreted by the Court in *Dolan*. Appendix A at 3-4. The Oregon Court of Appeals rejected Rogers' argument, distinguishing between legislatively imposed exactions and adjudicatively imposed exactions. According to the court, the TIF is "a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either

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[1] This petition does not address the court's tax/fee analysis, since it was based on Oregon law and played no role in the court's ruling.

in the imposition or in the calculation of the fee." *Id.* at 36. The court concluded, "*Dolan*'s heightened scrutiny does not extend to development fees of that kind." *Id.* at 36.

The Oregon Supreme Court denied Rogers' petition for review. Appendix B. To challenge the ruling of the Oregon Court of Appeals, Rogers timely files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ARE HOPELESSLY SPLIT ON THE APPLICABILITY OF *DOLAN* TO LEGISLATIVELY IMPOSED EXACTIONS

There is a split of authority recognized by the Oregon Court of Appeals, legal scholars, and others regarding the applicability of *Dolan* to legislatively adopted exactions.[2] Some lower courts apply *Dolan's* heightened scrutiny to exactions derived from legislatively adopted formulas, while other courts limit *Dolan's* applicability to ad hoc exactions created for a specific land use application. This split of authority results in uncertainty for all parties involved in land use planning and development, and can only be rectified by the Court. This case presents the opportunity for the Court to further clarify *Dolan*, and eliminate an issue that has confounded lower courts and scholars alike.

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[2] *See* Rogers, (Appendix A at 23) (noting split in lower courts); Faus, *Exactions, Impact Fees, and Dedications - Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 Stetson L. Rev. 675, 704-06 (2000) (noting "nationwide split of authority on whether exactions based on clear and objective standards are subject to *Dolan*" and indicating that "a strong argument exists" for limiting applicability of *Dolan* to adjudicative exactions; Dana, *Land Use Regulation In An Age of Heightened Scrutiny*, 75 N.C.L. Rev. 1243, 1260-61 (1997) (noting that *Dolan* applies to legislative exactions).

A. Cases Applying *Dolan* to Legislative Exactions

A number of lower courts apply *Dolan* to legislatively adopted exactions. For example, in *Home Builders Association of Dayton v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000), the Ohio Supreme Court applied a "dual rational nexus" test "based on the *Nollan* and *Dolan* cases" to a transportation impact fee ordinance adopted by the City of Beavercreek.[3] The impact fee was "payable by developers of real estate to aid in the cost of new roadway projects," and was challenged as a taking of property under both the Ohio and United States' Constitutions. *Id.* at 353-54.

As did the Court in *Dolan*, the Ohio Supreme Court compared the various methodologies adopted by other states for determining the constitutionality of an impact fee ordinance, and applied the "dual rational nexus" test, holding that this test provided a middle level of scrutiny required by *Dolan*. *Id.* at 356. After applying the test, the court upheld the ordinance. *Id.* at 358.

In *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. 2000), *aff'd*, 49 P.3d 860 (Wash. 2002), the Washington Court of Appeals (Division Two) applied *Dolan* to an exaction requiring the developer to pay for offsite traffic improvements. The requirement for the payment of the improvements was based on clear and objective provisions of the Battle Ground Municipal Code, a legislatively adopted ordinance.[4] The court rejected the city's argument that the

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[3] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[4] Although the Oregon Court of Appeals questioned Rogers reliance on the *Benchmark* opinion on the ground that it was unclear whether the exaction was legislatively mandated or was adjudicative in nature, the subsequent opinion of the Washington Supreme Court, which was issued after the Rogers opinion, makes clear that the exactions imposed by the City of Battle Ground were legislative in nature. *See Benchmark*, 49 P.3d at 862.

exaction should be reviewed under the two-prong test in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) or the three-prong test in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and instead applied *Dolan*. *Id.* at 175. The court, quoting this Court's language from *Armstrong v. United States*, 364 U.S. 40 (1960), held:

> Further, if the *Dolan* proportionality test does not apply, the government can exact conditions such as the one here with few limits. The condition advances a legitimate state interest—improving the public roads. And the condition does not deny the developer all economically viable use of its land. But the condition also seeks to force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." It is this attempted transfer of a public burden that calls for a *Dolan* proportionality test.

Id. at 175 (footnote and citation omitted).

In *Trimen Development Co. v. King County*, 877 P.2d 187 (Wash. 1994), the Washington Supreme Court applied *Dolan* to a legislatively adopted park development fee which the county required the developer to pay in lieu of dedication of land for open space. The court reached the following conclusion-"We conclude therefore that the fees imposed in lieu of dedication were reasonably necessary as a direct result of Trimen's proposed development. See *Dolan v. City of Tigard* ('rough proportionality' between required dedication and impact of proposed development)". *Id.* at 194.

The New York Court of Appeals applied *Nollan* and *Dolan* to a rent stabilization statute in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995). The statute, which was obviously legislatively adopted, required owners of certain apartments in New York City to offer leases in perpetuity on those apartments to the hospital for use by the hospital's employees. The court

invalidated the statute, finding that it did not substantially advance a "closely and legitimately connected State interest." *Id.* at 480. According to the court, in order for a substantial state purpose to be present, there must be a "close causal nexus" between the legislation and the problem it seeks to remedy. *Id.* at 482. The court found that the "close causal nexus" requirement was established by *Dolan*, and that *Dolan* and the other Supreme Court takings cases establish a "constitutional minimum floor of protection which this Court lacks authority to diminish under the Supremacy Clause." *Id.* at 482.

The Illinois Supreme Court applied *Nollan* and *Dolan* to a legislatively adopted transporation impact fee in *Northern Illinois Homebuilders Association v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995). The Homebuilders Association challenged the impact fee ordinance and enabling state legislation on the ground that it violated the takings clauses of the United States and Illinois Constitutions. *Id.* at 388. The court relied on *Nollan* and *Dolan* for establishing a minimum standard for determining whether an exaction satisfies the Takings Clause, and went beyond *Dolan*'s "rough proportionality" test, applying the "specifically and uniquely attributable" test to determine whether the impact fees were sufficiently related to the impact on the county's transportation system resulting from new development.[5] *Id.* at 389.

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[5] The court relied on its previous decision in *Pioneer Trust & Savings Bank v. Mount Prospect*, 176 N.E.2d 799 (Ill. 1961), as authority for going beyond *Dolan's* "rough proportionality" requirement to the "specifically and uniquely attributable" test. The Court in *Dolan* described this test as requiring an even more exacting correspondence between the exaction and the impact caused by new development than the "rough proportionality test" that the Court ultimately adopted. *Dolan*, 512 U.S. at 389-91 (1994).

The Oregon Court of Appeals applied *Dolan* to a legislatively adopted exaction in *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. 1995). The city conditioned approval of an application to partition property upon the dedication of a portion of the property for street improvements. The city argued that the imposition of the dedication requirements was legislative, as the city zoning ordinance required the imposition of the conditions. *Id.* at 573. The court rejected that argument, holding that even if the ordinance required the imposition of the conditions (and was thus legislative), *Dolan* remained applicable, as the conditions required the owner to deed portions of the property to the local government. *Id.* at 573.[6]

B. Courts Applying the Legislative Exaction/ Adjudicative Exaction Distinction

In addition to the Oregon Court of Appeals, a number of other courts distinguish between exactions imposed pursuant to a legislatively enacted ordinance, and those imposed on a discretionary, adjudicative basis. The California Supreme Court applies *Dolan* to monetary exactions imposed on an individualized and discretionary basis, but does not apply *Dolan* to monetary exactions imposed "generally" and "ministerially." *Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996); *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 102-104 (Cal. 2002). The court bases the legislative/adjudicative distinction on the "heightened risk of extortion," which the court believes is

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[6] In *McClure v. City of Springfield*, 28 P.3d 1222 (Or. 2001), the Oregon Court of Appeals reiterated its holding in *Schultz*, indicating that *Schultz* held "that it is the 'character of the restriction' that triggers the *Dolan* analysis, not whether it was imposed pursuant to local legislation." *Id.* at 1228 n.6. Thus it is clear that for purposes of the applicability of *Dolan*, the court in *Schultz* rejected the legislative/adjudicative distinction, and relied on the distinction between the type of exaction (real property v. money). Yet in *Rogers*, the court revitalizes the legislative/adjudicative distinction, at least as to monetary exactions. Appendix A at 33.

present in the case of adjudicative exactions, and absent in the case of legislative exactions. *Ehrlich*, 911 P.2d at 444.

In *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. 1996), the Minnesota Court of Appeals refused to apply *Dolan* to a city ordinance requiring mobile home park owners to pay relocation costs to their tenants upon closure of the park. The court, relying on a narrow interpretation of *Dolan* with no discussion of the rationale for its holding, held that *Dolan* does not apply to "citywide, legislative land-use regulations." *Id.* at 286. The court also held that *Dolan* is limited to exactions of real property. *Id.* at 286.

In *Home Builders Association v. City of Scottsdale*, 930 P.2d 993, (Ariz. 1997) *cert. denied*, 521 U.S. 1120 (1997), the Arizona Supreme Court refused to apply *Dolan* to a water resources development fee, which the court characterized as a generally applicable legislative fee. *Id.* at 1000. The court noted that the question was unsettled, citing the dissent of Justices Thomas and O'Connor in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., dissenting). Nevertheless, the court held that the risk of leveraging on the part of the local government is nonexistent when the exaction is legislatively adopted. *Id.* At 1000.

The Colorado Supreme Court rejected a *Dolan* challenge to a "plant impact fee" in *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2001). The court held that the fee was a generally applicable service fee on all new development within the district, and that *Dolan* was inapplicable to legislatively based fees, as all similarly situated landowners are subject to the same fee, and no one single landowner could be singled out for "extraordinary concessions." *Id.* at 696. The court also refused to apply *Dolan* to exactions that do not involve the dedication of real property. *Id.* at 697-98.

C. The Court's Response to the Legislative/ Adjudicative Distinction

As the Oregon Court of Appeals notes in *Rogers*, in the eight years since *Dolan* was decided, the Court has declined to grant certiorari in cases that would provide further guidance to lower courts on the applicability of *Dolan* to legislative exactions. Appendix A at 21. As an example, the court cites to the denial of certiorari in *Parking Association of Georgia v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied,* 515 U.S. 1116 (1995) (Thomas, J., dissenting).

In *Parking Association*, the Georgia Supreme Court refused to apply *Dolan* to an Atlanta ordinance requiring minimum curb barriers and landscaping in parking lots. *Parking Association*, 450 S.E.2d at 203. The court held that *Dolan* did not apply to legislative determinations that simply limited the use of property, apparently (but not clearly) contrasting that situation with one in which an exaction is imposed. *Id.* at 203.

The plaintiff filed a petition for certiorari to the Court, which denied the petition. Justice Thomas, joined by Justice O'Connor, dissented from the denial of certiorari. *Parking Association*, 515 U.S. at 1116. In their dissent, Justice Thomas noted the lower courts' confusion over the applicability of *Dolan* and the split in the lower courts (which was small at the time), and questioned the logic of distinguishing between legislative and adjudicative exactions.[7] *Id.*

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[7] Given the facts of *Parking Association*, the legislative/adjudicative distinction considered by Justice Thomas appears to be that between an ordinance of general applicability (such as a zoning ordinance) and the application of an ordinance in the form of an exaction. By refusing to apply *Dolan* to exactions that were created legislatively, the Oregon Court of Appeals and the other lower courts making the legislative/adjudicative

In the years since Justice Thomas' dissent, the confusion in the lower courts over the applicability of *Dolan* has increased, and the split has widened. Given the importance of the issue, a ruling from the Court would be welcome relief for all involved.

II. LIMITING THE APPLICABILITY OF *DOLAN* TO ADJUDICATIVELY IMPOSED EXACTIONS IS CONTRARY TO THE TAKINGS CLAUSE AND EVISCERATES *DOLAN*

As Justice Stevens noted in the first paragraph of his dissent in *Dolan*, *Dolan* is "unquestionably an important case." *Dolan*, 512 U.S. at 396. That was true in 1994, and is equally true today. Local governments are increasingly relying on exactions as a substitute for politically unpopular tax increases.[8] The *Dolan* decision has been the subject of innumerable law review articles and court opinions. The Court's holding significantly impacts local government officials, land use planners, land use attorneys, environmentalists, property rights advocates, business owners, and landowners throughout the country.

The *Rogers* decision substantially weakens the Court's holding in *Dolan*. By carving out an exception for monetary exactions imposed legislatively, as opposed to exactions imposed on an individualized, adjudicative basis, the Oregon Court of Appeals creates an exception that swallows the rule, thereby eviscerating *Dolan*. Not only is this contrary to *Dolan*, it is at odds with the purposes of the Takings Clause.

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distinction have limited *Dolan* to an even greater extent than that which Justice Thomas was discussing in *Parking Association*.

[8] Sterk, *Nollan, Henry George, and Exactions*, 88 Colum. L. Rev. 1731 (1988); also *see* Gillette and Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L. Rev. 795, 796 n.3 (1987) (citing authorities establishing that user fees are the fastest growing component of local government revenues).

The Takings Clause of the Fifth Amendment, made applicable to the states via the Fourteenth Amendment[9], is designed to protect the minority from the unfettered will of the majority. As the Court notes, one of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Exactions are but one form of land use regulation that implicates the Takings Clause. *Cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 122 S.Ct. 1465, 1478-79 (2002) (discussing takings arising by physical occupation and regulatory takings arising from regulations limiting the use of property). In *Rogers*, the Oregon Court of Appeals defined an exaction as an in-kind property dedication, a fee in lieu of a property dedication, or an impact fee or special assessment to cover the cost of development. Appendix A at 14 (citing Bell and Parchomovsky, *Givings*, 111 Yale L.J. 547 (2001)).

Unlike other forms of land use regulation, an exaction arises at a time when the inequity in bargaining power between the applicant for a development permit and the local government is at its peak. The government has a monopoly power over the issuance of development permits. If an applicant for a development permit does not accede to the local government's exaction demands, the permit will not be issued. For that reason, exactions create a heightened risk for extortionate behavior by local governments.[10] Whether the exaction is imposed through a legislatively adopted formula (where the discretion rests with the legislative body creating

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[9] *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

[10] *See* Kmiec, *Private Property and the Future of Government Regulation: Inserting the Last Remaining Pieces Into the Takings Puzzle*, 38 Wm. and Mary L. Rev. 995, 1039-40 (1997).

the formula) or on an adjudicative, case by case basis (where the discretion rests with the planner or planning commission) is of little distinction to the applicant. In either event, the applicant's ability to object to an unconstitutional demand is severely compromised by the fact that the applicant is seeking something that only the local government can provide.

As illustrated above, the lower courts limiting *Dolan*'s holding to adjudicative exactions base their decision on the lessened risk of extortionate behavior resulting from the application of a legislatively adopted exaction. In *Rogers*, the Oregon Court of Appeals cited and adopted the following passage from a concurring opinion of Justice Mosk of the California Supreme Court:

> While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

Rogers, quoting *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (Ca. 2002) (Mosk, J., concurring). But the logic behind this rationalization is elusive. In fact, the risk of extortionate behavior on the part of local government is every bit as high in the context of the adoption of a legislative exaction as it is in the adoption of an adjudicative exaction.

Since exactions are used to provide public services that would otherwise be funded by broadly based taxes (or not provided at all), they provide a form of raising revenue for public projects that affects a minuscule minority of the voting

populace (the developers, who may or may not be residents of the community, and those landowners who are currently contemplating a development project). Contrary to the court's logic in *San Remo*, an exaction can be used to provide the vast majority of voters with something for nothing, allowing a city council to fund public projects on the backs of "greedy developers," "land barons," or whatever other politically popular phrase they can coin.[11] Applying the above quote from *San Remo*, why would there be "widespread and well financed opposition" from the voting populace to this type of fundraising scheme, and how could that opposition be effective?

The facts of *Rogers* serve to illustrate the flaw in the legislative/adjudicative distinction. Rogers was forced to contribute $37,018 to offset imaginary new traffic generated by Rogers' imaginary new employees driving their imaginary new cars. And in the meantime, the voters of the City of Tigard received a $37,018 windfall, which they could use for public services that they desired but did not want to pay for. After all, as the Washington County Hearings Officer concludes, there were no "traffic impacts" resulting from Rogers new building, and therefore no need to use the $37,018 collected from Rogers to make traffic improvements to offset Rogers development. Appendix E at 45.

Moreover, the legislative exaction/adjudicative exaction distinction developed by some lower courts creates a disincentive for local governments to tailor their exactions to offset the actual impacts created by a new development project. Imposing exactions in an adjudicative setting, where the exact impacts of a new development can be determined,

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[11] *See* Reznik, *The Distinction Between Legislative and Adjudicative Decisions In Dolan v. City of Tigard*, 75 N.Y.U.L. Rev. 242, 270 (2000); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 405-07 (1977).

will invariably yield much more fair and precise results than attempting to adopt a "one size fits all" exaction legislatively.

But the legislative exaction/adjudicative exaction distinction punishes local governments for attempting to be fair and precise, by subjecting a more precise adjudicative ordinance to heightened scrutiny (and a shift in the burden of proof) under *Dolan*, and applying a lower level of scrutiny to a "one size fits all" legislative exaction. The imprecision of a legislatively enacted exaction will create situations where the land use applicant is overcharged and, in the words of *Armstrong*, 364 U.S. at 49, forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." It will also create situations where the land use applicant is undercharged, thus providing a windfall to the applicant at the expense of the local taxpayers. It would be an odd result indeed to interpret the Takings Clause in a manner that promotes government imprecision at citizen expense.

Not only does the legislative exaction/adjudicative exaction distinction create a disincentive for local governments to be precise in their land use decisions, it also creates a myriad of interpretational problems for courts, local governments, and private citizens. Depending on the definitions of legislative and adjudicative, many exactions will contain elements of both.[12] For example, the exactions in *Dolan* and *Nollan* were imposed in the context of a quasi-judicial, adjudicative setting, but were based upon legislatively enacted provisions of a local government zoning ordinance. *Dolan*, 512 U.S. at 377-80; *Nollan*, 483 U.S. at 828-30. This mixture of

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[12] See Reznik, *supra* note 11 at 260 ("Local governments do not exhibit, nor must they follow, strict notions of separation of powers requiring independent legislative, executive, and judicial branches with distinct roles.")

legislative and adjudicative acts is typical of land use actions, and makes the legislative/adjudicative distinction problematic.

Unfortunately, there is no clear definition of what is legislative and what is adjudicative in the context of land use law.[13] In fact, as *Dolan* and *Nollan* prove, the typical land use case involves both functions.[14] Drawing a distinction between legislative exactions and adjudicative exactions will require the lower courts to either 1) attempt to draw a clear line between the two, which will be difficult given the procedural nature and local government function in land use planning decision-making, or 2) create a standard that allows the determination to be made on a case-by-case basis, thus creating another "test" in takings law jurisprudence, an area that is already replete with "tests." In either event, without guidance from the Court, a further split (a "split of the split") in the lower courts that recognize the legislative exaction/adjudicative exaction distinction is probable, adding even more confusion to this area.

The cause of the much of the lower courts' confusion appears to stem from the *Dolan* opinion itself. In particular, the Court twice draws a distinction between the exaction imposed on *Dolan*, which the Court characterizes as an "adjudicative decision to condition petitioner's application for a building permit on an individual parcel," and "essentially legislative determinations classifying entire areas of the city,"

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[13] See Kmiec, *supra* note 10 at 1041, Reznik, *supra* note 11 at 257-265.

[14] The facts of Rogers are further evidence of the lower courts confusion. Although the Oregon Court of Appeals insisted in Rogers that the TIF was a legislative exaction, counsel for Washington County acknowledged that there were elements of discretion involved in calculating the TIF, that selection of the most appropriate category of use (e.g. office, industrial, commercial etc.) would have a substantial effect on the amount of the TIF, and that the City had exercised discretion in determining the amount of the TIF. *See* Memorandum Regarding Motion To Dismiss (Washington County Circuit Court, C971202CV).

like the adoption of a zoning ordinance by the Village of Euclid in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) or the adoption of a "general plan governing both land use and the development of open space land" by the City of Tiburon in *Agins v. City of Tiburon* , 447 U.S. 255 (1980). *Dolan*, 512 U.S. at 385, 391 n.8 (1994).

There is nothing, however, in the Court's language to indicate that the Court intended to draw a distinction between differing types of exactions. Indeed, as one legal commentator notes, "why should a common legislative scheme of conditions escape scrutiny if it lacks either nexus or proportionality? An unconnected or disproportionate condition is extortionate, regardless." Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed From Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 575 (1999).

Instead, the more plausible reading of *Dolan* is that the Court was simply drawing a distinction between exactions, which typically involve the imposition of a legislatively adopted ordinance in the context of a single land use application, and zoning decisions made independently of a quasi-judicial decision on a particular land use application. In the latter instance, the risk of extortion is not as pervasive, as a property owner affected by the proposed land use regulation will not have to risk the loss of a development permit in order to object to the proposed regulation.

If allowed to stand, the interpretation of *Dolan* by the Oregon Court of Appeals and the appellate courts of the other states drawing the legislative exaction/adjudicative exaction distinction effectively nullifies the Court's holding, as any government lawyer worth her salt can craft a legislatively adopted ordinance imposing a fee exaction to provide some public benefit that they would otherwise be unable to achieve

if *Dolan's* "rough proportionality" analysis was applied, a result that seems antithetical to the Court's rationale. Surely *Dolan* means more than this.

CONCLUSION

For the foregoing reasons, petitioner prays that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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November 12, 2002